H.R. 1904, THE "HEALTHY FORESTS RESTORATION ACT OF 2003"
DISSENTING VIEWS

We support initiatives to protect our communities from the threat of wildfires. We dissent from H.R. 1904, the "Healthy Forests Restoration Act of 2003," because that is not what this legislation would do. The bill, in the guise of limiting an alleged boom in dilatory challenges of government measures to reduce wildfire threats,[1] instead gives the executive branch unfettered administrative discretion to implement land management decisions, deters administrative and federal court reviews of such actions, harms plaintiffs' rights, and intrudes on the independence of our courts.[2]

Such provisions are even more egregious considering that the General Accounting Office has found few, if any, delays in the implementation of projects to reduce wildfire threats.[3] As stated earlier, the alleged existence of such delays was the rationale for these provisions. It is for these reasons that H.R. 1904 is opposed by numerous organizations concerned with:

(1) the enforcement of our environmental laws (including the Natural Resources Defense Council (NRDC), The Wilderness Society, Friends of the Earth, the Endangered Species Coalition, the National Audobon Society, the World Wildlife Fund (WWF), American Lands Alliance, Defenders of Wildlife, EarthJustice, the Center for Biological Diversity, the National Environmental Trust, the Sierra Club, the National Forest Protection Alliance, and the U.S. Public Interest Research Group);[4] and

(2) the fair administration of justice and the enforcement of our civil rights laws (including ADA Watch/ National Coalition for Disability Rights, Alliance for Justice, Americans for Democratic Action, the Bazelon Center for Mental Health Law, the Mexican American Legal Defense and Educational Fund (MALDEF),

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[1]The White House, Healthy Forests: An Initiative for Wildfire Prevention and Stronger Communities (Aug. 22, 2002). Available at: http://www.whitehouse.gov/infocus/healthyforests/Healthy_Forests_v2.pdf.

[2]*See* H.R. 1904, §§ 104-107. At the full Committee markup on the bill, Rep. Tammy Baldwin (D-WI) offered an amendment that would have struck the objectionable sections, but the Majority unfortunately rejected it. *See* MARKUP OF H.R. 1904, HOUSE COMM. ON THE JUDICIARY, 108th Cong., 2d Sess. (May 14, 2003) [hereinafter *H.R. 1904 Markup*].

[3]*See, e.g., Few Wildfire Project Delays, GAO Finds*, WASH. POST, May 15, 2003, at A27 ("The conclusion [of the General Accounting Office report] runs counter to the case the Bush administration and Republicans in Congress have made for scaling back studies and appeals.").

[4]Letter from Natural Resources Defense Council *et al.*, to U.S. Representatives (May 8, 2003) [hereinafter *NRDC Letter*].

the National Association for the Advancement of Colored People (NAACP), National Alliance of Postal and Federal Employees, the National Organization for Women (NOW), People for the American Way, Planned Parenthood Federation of America, and the Religious Coalition for Reproductive Choice).[5]

### A. The Legislation Would Give Unchecked Administrative Authority to the Executive Branch

A primary concern with H.R. 1904 is that it proposes to give the executive branch virtually unchecked authority to implement decisions and to consider administrative appeals of such decisions. For instance, the bill empowers the relevant cabinet department by stating it would no longer be required to consider any alternatives to an original proposal when issuing forest-related decisions.[6] The heart of the environmental analysis process is for the agency to consider alternatives to their plans so that the best plan can be chosen;[7] this bill essentially turns that concept on its head and says that an agency's first idea is the best idea.

The legislation goes further and gives agencies additional power in quashing administrative appeals of their decisions. Current law, in the form of the Appeals Reform Act, imposes strict requirements on the process for administrative appeals of U.S. Forest Service decisions, such as letting public participants submit written or oral comments, requiring Forest Service employees to offer to meet with any individual who files an appeal, and the triggering of an automatic 45-day stay of Forest Service decisions.[8] The bill explicitly vitiates these protections, such that the Forest Service would be empowered not only to dismiss certain public comments and the individuals who submit them but also to proceed with its plans immediately.[9]

### B. The Legislation Would Harm Plaintiffs' Rights and Tie the Hands of the Courts

In addition, the legislation would restrict the rights of all federal court plaintiffs and

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[5]Letter from ADA Watch *et al.*, to U.S. Representatives (May 13, 2003) [hereinafter *ADA Watch Letter*].

[6]H.R. 1904, § 104(b).

[7]*NRDC Letter*. *See also* Letter from Lois Schiffer, Adjunct Prof. of Environmental Law, Georgetown University Law Center, *et al.*, to the Honorable James Hansen, Chairman, House Comm. on Resources, & the Honorable Scott McInnis, Chairman, House Subcomm. on Forests & Forest Health (Oct. 7, 2002) (analyzing similar provision in earlier, yet similar, legislation).

[8]16 U.S.C. 1612 note.

[9]*See* H.R. 1904, § 105(c).

subject federal courts to rigid deadlines. The bill's requirement that any actions filed against the United States to challenge hazardous fuels reduction projects be filed within fifteen days (including weekends and holidays) of the final notice of such projects would make it impossible to seek redress for improper or illegal agency decisions.[10] Moreover, the bill expressly provides that neither the government nor a court could waive the filing deadline under any circumstance.[11] As a result, if the government issues a rule authorizing an entity to conduct a controlled burn or cut timber in a certain wooded area, a community living near that wooded area would have fifteen days to learn of the rule, determine what it does, determine whether it affects the community's residents, decide whether to file a legal action, retain an attorney, prepare the legal documents, and file the action against the entity that is exercising the rule. The fifteen-day deadline would apply regardless of weekends, holidays, or even in the event the residents of the community were evacuated from their homes because of some emergency.

Moreover, the fifteen-day limitation would apply to every other federal law. More specifically, it would supercede any other provision in any law that pertains to notices of intent to file suit or to filing deadlines.[12] For example, at least sixty days before filing a citizen suit against an entity for non-compliance with the Clean Water Act, notice must be given to the government and the potential defendant.[13] Under this bill, if a community determined that a hazardous fuels reduction project violated the Clean Water Act, it would have only fifteen days to file suit instead of the minimum sixty days it has under current law.

The bill also seeks to impose unprecedented deadlines that would tie the hands of the courts and relegate unrelated, yet important, cases to the bottom of the pile. In suggesting that courts issue rulings on lawsuits and appeals on cases arising under the bill within 100 days of the initial filing date, section 106(c) virtually holds courts hostage to agency timing. Such a deadline also would place hazardous fuels reduction project lawsuits above all other federal cases on the dockets, as the reduction project lawsuits would be considered first. This means that all other federal cases, including those pertaining to terrorism, criminal violations, civil rights law, worker rights, and employment discrimination, could be delayed in favor of cases arising under this legislation.[14] It is not surprising, then, that the courts have noted that "individual actions within a

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[10] *Id.* § 106(a).

[11] *Id.*

[12] *Id.*

[13] 33 U.S.C. § 1365(b). Such notice requirements also apply to citizen suits under the Safe Drinking Water Act (42 U.S.C. 300j-8(b)); the Clean Air Act (42 U.S.C. 7604(b)); the Resource Conservation and Recovery Act (42 U.S.C. 6972(b)); and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9659(d)).

[14] *See ADA Watch Letter.*

category of cases inevitably have different needs of priority treatment, which are best determined on a case-by-case basis."[15]

Finally, the bill would politicize and threaten the independence of our judiciary. When reviewing decisions of federal agencies, the courts would have to give unprecedented deference to the issuing agencies.[16] It has been noted that "this is an attempt to force courts to defer to agencies to allow projects to go forward even after the court has ruled that the agency actions are illegal."[17]

By making courts report to congressional committees on decisions to extend injunctions,[18] the bill would subject the courts and even individual judges to the constant scrutiny of politicians and thus violate separation of powers principles. Furthermore, while various federal laws do require the courts to submit reports to Congress, there are two major distinctions between those laws and this bill: (1) currently, reports are filed on an annual, semi-annual, or other periodic basis and not on the basis of specific decisions; and (2) currently, reports are filed by the administrative arm of the courts and not by individual judges.

### C. The Legislation was not Properly Reviewed in Committee

Finally, we note that the legislation did not receive a thorough review by the Committee on the Judiciary. Despite containing provisions regarding administrative and federal court procedures, H.R. 1904 was referred initially only to the Committees on Agriculture and the Committee on Resources. We are pleased the Judiciary Committee not only sought and received a referral of the bill for those provisions within its jurisdiction but also held a markup before letting the bill proceed to the floor. Unfortunately, the Judiciary Committee held no hearings on these far-reaching provisions; in fact, the Majority objected to Democratic requests for a hearing on the same or next day, before the expiration of the referral, so that members of Congress and of the public could understand the full impact of the proposed changes.[19]

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[15] *S. 220, the "Bankruptcy Reform Act," 2001: Hearings on S. 220 Before the Senate Comm. on the Judiciary*, 107th Cong., 1st Sess. (2001) (statement of the Honorable Edward R. Becker, Chief Judge of the U.S. Court of Appeals for the Third Circuit, on behalf of the Judicial Conference of the United States).

[16] *See ADA Watch Letter*.

[17] *NRDC Letter*.

[18] H.R. 1904, § 106(b).

[19] *See H.R. 1904 Markup*. Moreover, despite the Majority's assertions to the contrary in the markup, H.R. 1904 was not subject to hearings in either the Agriculture or Resources Committees.

In conclusion, proper administrative and judicial review of executive decisions and regulations are among the cornerstones of our system of government, which counts checks and balances as a basic tenet. This legislation attempts to eviscerate these checks and balances to give cabinet and federal agency officials virtually unchecked decisionmaking authority, seeks to subject plaintiffs and courts to rigid deadlines, and endeavors to place every federal lawsuit except those pertaining to this legislation on the back burner. For these reasons, we respectfully dissent.

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Jerrold Nadler
Bobby Scott
Melvin Watt
Zoe Lofgren
Sheila Jackson Lee
Maxine Waters
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William D. Delahunt
Robert Wexler
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